Supreme Court, U. S.
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80-150

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

HARTFORD ACCIDENT & INDEMNITY COMPANY
Petitioner,

vs.

JOHN MILES, JR.
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS AT FORT WORTH, TEXAS

Petition for Writ of Certiorari

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ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS AT FORT WORTH, TEXAS

Petition for Writ of Certiorari

QUESTIONS PRESENTED

1. Whether a dealer's bond issued pursuant to the Packers and Stockyards Act (7 U.S.C. Chap. 9) extends to and includes an agreement to purchase cattle in the absence of a "transfer of possession," sanctioning a recovery from this Surety where no cattle changed hands or entered the stream of interstate commerce.

2. If the dealer's bond is construed to apply to such an executory contract, whether or not the Act is a constitutional exercise of the power of Congress to regulate commerce. (Constitution, Art. 1, Sec. 8, Cl. 3)

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OPINION BELOW

The Judgment appealed from is reported in 590 SW 2d 223, and a copy of the Opinion and Judgment is attached as Appendix "A". The findings of fact and conclusions of law and the judgment in the Trial Court are also included in said Appendix.

JURISDICTION

The Judgment of the Court of Civil Appeals was entered on November 8, 1979. Timely Motion for Rehearing was filed, and overruled on December 6, 1979. Timely Application for Writ of Error to the Supreme Court of Texas was filed and "refused no reversible error" by the Supreme Court of Texas April 9, 1980, with timely Motion for Rehearing "overruled" by that Court May 7, 1980. The Judgment of the Court of Civil Appeals became final on May 7, 1980.

The Petition is pursuant to 28 USC §1257 (3) in that the Judgment decided an important question of substantive federal law not heretofore determined by the Supreme Court of the United States (or any reported decision known to Petitioner by any other Court).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution of the United States, and the applicable provisions of the "Packers and Stockyards Act, 1921" are set out in their entirety in Appendix "B". For the convenience of the Court in considering this Petition, the following abbreviated version is submitted:

Constitution of the United States

The Constitution grants Congress the power:

> "to regulate Commerce . . . among the several States . . ." (Art. 1, Sec. 8, Cl. 3)

The "Packers and Stockyards Act, 1921" 7 U.S.C.:

§183 says:

> ". . . *a transaction* in respect to any article shall be considered to be *in commerce if* such article is *part of* that *current of commerce* usual in the livestock and meat-packing industries, *whereby livestock* . . . are *sent* from one State with the expectation that they will end their transit, *after purchase,* in another, *including* . . . all cases where *purchase* or sale is either *for shipment* to another state or for slaughter . . . within the State and the shipment outside the State of the products resulting from such slaughter . . ." (Emphasis supplied)

§201(d) defines "dealer":

> "(d) The term 'dealer' means any person . . . engaged in the business of buying or selling *in commerce* livestock . . ." (Emphasis supplied)

§203 requires that every livestock "dealer" be registered.

§204 requires that every livestock "dealer" be bonded.

§228 grants to the Secretary of Agriculture certain powers to promulgate rules and regulations under the Act.

§228b(a) says, in part:

> "(a) Each . . . dealer purchasing livestock shall,

before the close of the next business day following the purchase of livestock *and transfer of possession* thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price . . .'"[1] (Emphasis supplied)

STATEMENT OF CASE

A. Material Facts

Respondent Miles (a rancher) sued Starks (a registered cattle dealer under the Packers and Stockyards Act) for breach of a cattle purchase contract and joined Petitioner, the surety on Starks bond issued pursuant to the Act, as a Defendant. Starks was unable to pay for the cattle and refused delivery. Miles retained possession of the cattle at all times and until the cattle were sold to third parties who paid Miles for them.

The Trial Court granted judgment against Starks for Miles loss on the contract but denied recovery against Petitioner. Miles perfected an appeal from this judgment, but Starks did not.

---

[1] This provision was added when the Act was amended substantially September 13, 1976. The amendment merely explicates that the term "purchase" does indeed include the "transfer of possession" as a condition to the requirement for payment. The prior regulation and claim form promulgated by the Secretary of Agriculture are set out in Appendix "C". It is quite clear that the amendments to the Act were designed to delineate the time for payment and strengthen the right of cattle producers who had sent their livestock to packing plants or otherwise transferred possession of their livestock to parties engaged in interstate commerce under the Act. 1976 *U.S. Code Cong. and Admin. News*, 2267 et.seq.

B. Stage at which Federal Question was Raised

As shown by the annexed opinion and the annexed findings of fact, conclusions of law and judgment of the Trial Court, the federal question relating to the proper construction of the Act was raised in the District Court and asserted at every stage of the proceedings thereafter.

The constitutionality of the Packers and Stockyards Act is based upon the commerce clause.

ARGUMENT

A. The Question is One of First Reported Impression[1]

In all reported cases in which a surety has been held liable, the seller had been parted from his cattle (a "transfer of possession"), initiating the movement of the cattle into interstate commerce, but the dealer had not paid for them.

If "transfer of possession" is the event under the Act requiring payment by the dealer, surely it must be a condition precedent to payment by his surety.

In this case, no cattle changed hands. Miles retained possession of the cattle, they were never delivered to

---

[1] We do, however, point out to the Court its opinion in *Mahon v. Stowers*, 416 U.S. 100, 94 S.C. 1626, 40 L.Ed.2d 79 (1974) which involved the Packers and Stockyards Act, and related regulations of the Secretary of Agriculture, in which the Court said:

"We think that a fair reading of 9 CFR §201.99 reveals its overriding concern that *cattle sellers, having delivered their livestock into the hands of a purchasing packer* prior to actual determination of the purchase price, receive a fair and accurate accounting of the proceeds of their sale." (Emphasis supplied)

Petitioner's principal. The condition of Starks' bond was that he:

> ". . . shall pay to the person or persons entitled thereto, the purchase price of all livestock *purchased* . . ." (Emphasis supplied)

Webster's Third New International Dictionary (unabridged) in defining the word "purchase" mentions change of "possession" at least four times. The bond is in the past tense, "purchased" which should mean the rancher has executed his part of the bargain by delivering his cattle to the dealer. That is not this case.

B. The Act is not a Constitutional Exercise of the Power of Congress to Regulate Commerce if a Dealer's Bond is Held to Cover a Transaction in which no Cattle Changed Hands or Entered the Stream of Interstate Commerce.

The original purpose of the Packers and Stockyards Act was to remedy undesirable and discriminatory practices which had arisen in connection with the buying and selling of cattle at major stockyards. In 1958, it was amended in response to changing livestock marketing practices, to include the country buying of livestock. 1958 *U.S. Code Cong. and Admin. News*, p. 5212, 5216.

Nothing in the statutory history of the Act indicates an intention to protect a seller of livestock for loss of a bargain where the animals were not delivered to the purchaser. As this Court said in *Western Livestock Co. v. Bureau of Revenue*, 303 U.S. 250, 253, 82 L.Ed. 823, 826, 58 S.C. 546 (1937):

> "That *the mere formation of a contract* between persons in different states *is not within the protection of the commerce clause*, at least in the absence of Congressional action, unless the *performance* is within its protection, is a proposition no longer open to question." (Emphasis supplied)

C. The Question is Substantial

The livestock industry remains an important segment of our economy. There are thousands of "registered" dealers all with statutory bonds. If these bonds are construed as applying to executory contracts (without a transfer of possession) then surety companies writing the bonds will either demand, and get, substantial premium increases or get out of the business. Without the tangible evidence of a "transfer of possession", the potential for fraud and collusion in the volatile cattle market is too great.

We respectfully submit that for a "transaction" of this nature to come within the terms of the Act, there must be a "purchase" which includes a "transfer of possession". Again, the applicable portion of §228b says:

> "(a) Each . . . dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock *and transfer of possession* thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price . . ." (Emphasis supplied)

Accordingly, Petitioner is not liable on the bond.

PRAYER

Petitioner, Hartford Accident and Indemnity Company, prays that Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas in this case.

Respectfully sumitted,

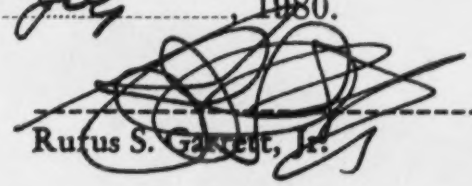
RUFUS S. GARRETT, JR.
Attorney for Petitioner

Garrett, Settle & Callaway
2900 Fort Worth Nat'l. Bank Bldg.
Fort Worth, Texas 76102

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Petition for Writ of Certiorari has been made by depositing the same at the United States Post Office with first class postage prepaid on Respondent, John Miles, Jr., by mailing three (3) copies to his attorney of record: Mr. Douglas R. Hudman, Hooper & Chappell, 810 West 10th Street, Fort Worth, Texas 76102.

It is further certified that all parties required to be served have been served, by the means aforesaid this 24th day of July, 1980.



Rufus S. Garrett, Jr.

APPENDIX A

JUDGMENT APPEALED FROM

From the District Court of Hood County
(No. 6577) November 8, 1979

18145

John Miles, Jr.

vs.

Robert K. Starks d/b/a/ Western
Cattle Company and d/b/a Saginaw
Cattle Company and Hartford
Accident & Indemnity Company

Opinion by Justice Spurlock

This cause came on to be heard on the transcript of the record and the same having been reviewed it is the opinion of the Court that there was error in the judgment of the trial court.

It is therefore ordered that the portion of the trial court judgment providing that John Miles, Jr. take nothing against Hartford Accident and Indemnity Company is hereby reversed and judgment rendered that John Miles, Jr. do have and recover against Hartford Accident and Idemnity Company the amount of $25,580.23, plus interest at 6% per annum from November 30, 1976 until October 3, 1978. Judgment is also rendered that John Miles, Jr. recover interest on $25,580.23 at 9% per annum from October 3, 1978 until the judgment is paid.

It is further ordered that Hartford Accident and Indemnity Company pay all costs in this behalf expended, for which let execution issue, and that this decision be certified below for observance.

OPINION

590 SOUTH WESTERN REPORTER, 2d SERIES 223

John MILES, Jr., Appellant,

v.

Robert K. STARKS d/b/a/ Western Cattle Company and d/b/a Saginaw Cattle Company and Hartford Accident & Indemnity Company, Appellee.

No. 18145.

Court of Civil Appeals of Texas,
Fort Worth.

Nov. 8, 1979.

Rehearing Denied Dec. 6, 1979.

OPINION

SPURLOCK, Justice.

This is an appeal from a portion of a judgment that the seller of cattle take nothing against the surety of the buyer on a livestock dealer's bond. The primary question on appeal is whether the transaction in question constituted a purchase within the terms of the bond and federal law authorizing and requiring the bond.

We reverse and render.

John Miles, Jr., raises cattle on a ranch near Cresson, Texas. Robert Starks is a bonded livestock dealer who is an Illinois domiciliary. Hartford Accident &

Indemnity Company is the surety on his livestock dealer bond issued pursuant to the Packers & Stockyards Act, 7 U.S.C.A. § 204 (Supp. 1979). On April 20, 1976 Starks visited Miles at his ranch and entered into a written contract on a form supplied by Starks. The contract provided in pertinent part as follows:

> "THIS CONTRACT of agreement made and entered into this the 20th day of April, 1976, by and between Miles Cattle Co. of Cresson, Texas, hereinafter called Seller, and Western Cattle Co. of Mendota, Ill., hereinafter called Buyer.
>
> "The Seller hereby sells and agrees to deliver to Buyer, or his order, the following described livestock: . . . (cattle described).
>
> ". . .
>
> "Seller acknowledges receipt of $14,300.00 at (sic) part payment by the Buyer — balance to be paid at time of delivery in current funds.
>
> ". . .
>
> "Seller agrees to furnish State and Federal inspection that will pass all regulations, and delivery is to be made F.O.B. cars or trucks in good condition at Ranch."

The agreement provided for delivery of the cattle in three lots during three designated delivery periods. The price agreed upon was $45.00 per hundred weight with cattle to be driven dry and weighed upon shipment. After the date of the contract but before the first delivery period the market price of cattle dropped below the contract price. By agreement of the parties

the first delivery of cattle was postponed. The market, however, did not improve and before any shipment was made Starks informed Miles that he could not pay for the cattle and would not accept delivery.

Miles and Starks worked together to sell the cattle to other buyers. Each party approved the sales, which were all for a price lower than the contract price. Miles credited Starks with the proceeds from the sales and the $14,300.00 Starks had already paid leaving a deficiency of $25,580.23. On September 21, 1976 Miles made a claim on Stark's livestock dealer's bond which was denied. Miles then filed suit against Starks and Hartford for the deficiency.

After a trial to the court, judgment was rendered against Starks for the deficiency. The court also rendered judgment that Miles take nothing against Hartford. The portion of the judgment against Starks has not been appealed.

Miles prosecutes this appeal on the take nothing portion of the judgment by five points of error. Miles's basic contention in all points is that the trial court erred in concluding that the transaction in question did not constitute a purchase within the terms of the bond. The bond provides in pertinent part as follows:

> "(2) If the said Principal (Starks) shall pay when due to the person or persons entitled thereto the purchase price of all livestock *purchased* by said Principal for his own account or for the accounts of others, . . .
>
> ". . .
>
> "[T]hen this bond shall be null and void, other-

> wise to remain in full force and virtue, subject to the following terms, conditions and limitations:
> "...
> "(c) Any person damaged by failure of the Principal to comply with any condition clause of this bond, may maintain suit in his own name to recover on this bond . . . ." (Emphasis ours.)

The form and language of the bond are as prescribed by the federal regulations under the Packers and Stockyards Act found at 9 C.F.R. § 201.27 (1978).

In its findings of fact and conclusions of law the trial court found that the contract in this case was one for a future purchase, rather than of a contract of purchase. Thus, the court found that there was no purchase as the term is used in the bond and applicable federal and Texas law. The court also found that Miles retained title to the cattle at all material times and that Hartford is not liable on the bond. Further, Hartford is not liable because the bond only applies where one has parted with his cattle and the purchaser fails to pay the price agreed upon for them. Miles's points of error and arguments dispute each of the pertinent findings and conclusions.

Neither the act nor the regulations thereunder define "purchase". However, we decide that if the contract and transaction in question resulted in a sale it follows *a fortiori* that there was a purchase within the ambit of the bond and controlling law. After a thorough examination of the contract and record in this case, we conclude there was a sale of the cattle and a corresponding purchase.

Note that the contract states that the seller *hereby sells* and agrees to deliver. This manifests the present intent to sell. In the context here, sell is the transfer of title to and property rights in the cattle for a price. Hartford correctly states that Tex. Bus. & Comm.Code Ann. § 2.401(b) (1968) dealing with the sale of goods provides title passes to goods at the time and place at which the seller completes his performance with reference to physical delivery of the goods. Where, as here, the delivery agreement did not require the seller to deliver the goods at destination, title passes to the buyer at the time and place of shipment. We note the contract provided for shipment F.O.B. seller's ranch.

Hartford would have us apply this section of the U.C.C. and hold that there was no purchase or sale of the cattle because they weren't shipped. However, § 2.401(b), which requires physical delivery applies only where the parties have not otherwise explicitly agreed when title to goods shall pass. While it is true that the term title was not mentioned in the contract, we conclude that the provision that the "seller hereby sells" is sufficient to evidence a present sale and passage of title. Only the transfer of physical possession and payment of the balance of the purchase price were executory.

Hartford contends that the fact that the contract allowed Starks to reject crippled, lump-jawed, bad-eyed, or otherwise unmerchantable cattle and to cull 10 head or less for quality resulted in the goods being unidentified. Hartford correctly states that un-

der the U.C.C., unidentified goods are future goods which cannot be the subject of a present sale until identification pursuant to Tex.Bus. & Comm.Code Ann. § 2.501 (1968) takes place. Hartford further notes that such identification would have taken place at shipment. The cattle would have been weighed then, thus determining the exact purchase price for the first time.

We conclude that the cattle in question were sufficiently identified at the time the contract was signed. The evidence established that the cattle described in the contract constituted Miles's whole herd. Tex. Bus. & Comm.Code Ann. § 2.501(a) (1968) provides that identification can be made even though the goods so identified are non-conforming and the buyer has an option to return or reject the non-conforming goods. If this were not the law it might be impossible for a sale to take place until the goods were inspected and all rejections and returns were made. We cannot accept this as the intent of this section of the U.C.C. Thus we conclude that under the facts of this case and the provisions of the contract with which we are involved, the determination of exactly which head of cattle, exactly what weight, and shipment thereof F.O.B. seller's ranch are immaterial to whether there was a sale.

Because we have held that there was a sale of the cattle at the time of the contract, we conclude that there was a purchase under the terms of the bond. We note, however, the possibility that the contract and transaction could also constitute a purchase as

defined by Tex.Bus. & Comm.Code Ann. § 1.201(32) (1968). That section defines purchase as follows:

> "(32) 'Purchase' includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property."

Tex.Bus. & Comm.Code Ann. § 2.106 (1968) defines sale as the passing of title from the seller to the buyer for a price. We note that purchase as defined by Tex.Bus. & Comm.Code Ann. § 1.201(32) (1968) speaks of a voluntary transaction creating an interest in property without any reference to title.

As discussed above, Tex.Bus. & Comm.Code Ann. § 2.501(a) (1968) provides that the buyer obtains a special property interest and an insurable interest in goods by identification of existing goods to which the contract refers even though the goods so identified are non-conforming and the buyer has an option to return or reject them. Since the cattle described in the contract consisted of Miles' entire herd, identification took place at the time the contract was signed. Thus Starks acquired a special property interest and an insurable interest in the cattle even if we should hold that title had not also passed. We assume without deciding that this interest would be within the definition of "purchase".

Our decision that there has been a purchase within the terms of the bond and applicable law is guided by the rule that a liberal construction of the bond and controlling law is to be given to effect the

purposes for both the bond and the Packers and Stockyards Act. The Act is remedial legislation and states that it is to be liberally construed in accord with its purpose to prevent economic harm to the producers and consumers of livestock. The purpose of the bond requirement is to safeguard the producers of livestock against losses suffered if they sell their livestock to insolvent or-defaulting purchasers. The Act intended to stabilize and encourage the production of beef and other livestock by building confidence in the financial stability of the dealers. *Travelers Indem. Co. v. Manley Cattle Co.*, 553 F.2d 943 (5th Cir. 1977).

By a counterpoint of error Hartford contends that the trial court was correct in rendering its take nothing judgment because Miles' claim on the bond was not timely filed. The bond provided that all claims must be filed within 120 days of the date of the transaction upon which the claim is made. Hartford would have us construe transaction as used in the condition of limitation in the bond to mean the date of the contract. It notes that throughout this litigation Miles has contended that there was a purchase as of the date of the contract, April 20, 1976. Hartford states in its brief that Miles filed his claim on September 21, 1976.

We decline to construe the date of the transaction in this case as the date of the contract. Neither the Packers and Stockyards Act nor the regulations thereunder define the term. However, we are convinced that the use of transaction is broader in scope than merely the date of the contract. Generally a transaction consists of an act, agreement, or several acts or

agreements between or among parties whereby a cause of action or alteration of legal rights occur. Here we hold that the transaction includes the dates within which delivery and payment were supposed to have occurred but for Stark's breach of the contract of sale.

Under the circumstances presented it is readily foreseeable that if the date of the transaction was held to be the date of the contract it is possible that no actionable breach could occur within 120 days and thus the time for filing a claim on the bond would expire before any claim arose. A construction making possible such a result does not conform with the purpose of the bond. We hold that the date of the transaction under the bond in this case includes the delivery periods within which the breach occurred and that the claim was timely filed. We overrule Hartford's counterpoint.

We reverse the portion of the judgment providing that Miles take nothing against Hartford. We render judgment that Miles recover against Hartford on the bond the amount of the deficiency, $25,580.23, plus interest at 6% per annum from November 30, 1976, the date Hartford denied the claim, to October 3, 1978, the date of the trial court's judgment. Judgment is also rendered that Miles recover interest on $25,580.23 at 9% per annum from October 3, 1978, until the judgment is paid.

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE TRIAL COURT

NO. 6577

IN THE DISTRICT COURT
HOOD COUNTY, TEXAS
29TH JUDICIAL DISTRICT

JOHN MILES, JR.
PLAINTIFF

VS.

ROBERT K. STARKS, DBA
WESTERN CATTLE COMPANY AND
DBA SAGINAW CATTLE COMPANY AND
HARTFORD ACCIDENT AND INDEMNITY
COMPANY
DEFENDANTS

FINDING OF FACT AND CONCLUSION OF LAW

At the request of the Plaintiff, I make and file the following as my findings of fact and conclusions of law in the captioned cause.

Findings of Fact

1. On April 20, 1976, Plaintiff entered into a contract for the sale of cattle to the Defendant Starks which provided that upon payment of the agreed purchase price for the cattle selected, same would be delivered to the Defendant Starks.

2. The Defendant Starks was a cattle dealer, licensed under the Packers and Stockyards Act, 7 U.S.C. §201 et. seq., and the Defendant, Hartford Ac-

cident and Indemnity Company, was the surety on his bond as required by that Act.

3. In July of 1976 the Defendant Starks told the Plaintiff that he would be unable to pay for the cattle and could not accept delivery of them.

4. Plaintiff located purchasers for the cattle, selling them in three separate lots, and delivering the cattle to such purchasers upon their payment to him of the purchase price which they had agreed upon.

5. The cattle were sold for $25,580.23 less than the Defendant Starks had agreed to pay for them, after crediting the down payment made by Defendant Starks.

6. Plaintiff maintained possession of the cattle until the same were delivered to the actual purchasers.

Conclusions of Law

1. The facts in this case show only a contract to purchase and do not evidence a "purchase" as that term is used in the *Packers and Stockyards Act*, 7 U.S.C. §201, et. seq., and the *Texas Bus. & Comm. Code.*

2. Title to the cattle in question remained in Plaintiff's possession at all times until he sold and delivered them to parties other than Defendant Starks.

3. The Defendant, Hartford Accident and Indemnity Company, is not liable to the Plaintiff as surety on the bond of the Defendant Starks, made pursuant to the *Packers and Stockyards Act*, in that the same applies only where one has parted with his cattle but the purchaser fails to pay the price agreed upon for them.

4. This is not a suit upon a sworn account and, accordingly, Article 2226, *Texas Revised Civil Statutes*, is inapplicable.

5. The Plaintiff, John Miles, Jr., is entitled to recover damages from the Defendant, Robert K. Starks, dba Western Cattle Company and dba Saginaw Cattle Company, in the amount of $25,580.23 plus interest to the date of judgment at the rate of six percent per annum and thereafter at the rate of nine percent per annum, and costs of court.

DATED October 4, 1978.

/s/ Herman Fitts
HERMAN FITTS, Judge
29th Judicial District
Hood County, Texas

JUDGMENT OF THE TRIAL COURT

NO. 6577

IN THE DISTRICT COURT
OF HOOD COUNTY, TEXAS
29TH JUDICIAL DISTRICT

JOHN MILES, JR.

VS.

ROBERT K. STARKS, ET AL

FINAL JUDGMENT

All parties having waived trial by jury, the above entitled cause came on for hearing before this Court on April 12, 1978. Plaintiff, JOHN MILES, JR., appeared in person and by his attorney. Defendants, ROBERT K. STARKS d/b/a WESTERN CATTLE COMPANY and d/b/a SAGINAW CATTLE COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, appeared by their respective attorneys. After presentation of the testimony, evidence and argument of counsel, the Court found that the Plaintiff and Defendant STARKS entered into a contract for the sale and future delivery of cattle on April 20, 1976. Defendant STARKS notified the Plaintiff that he would be unable to pay the purchase price of the cattle under the terms of the contract. The cattle were then resold by the Plaintiff in three lots at prices beneath that stated in the contract. As a result of Defendant STARKS' failure to pay for the cattle when due, Plaintiff was damaged in the amount of $25,580.23. The Court further found that Defendant HARTFORD ACCIDENT & INDEMNITY COMPANY was surety on a livestock dealers

bond naming the Defendant STARKS as principal. However, the contract for the sale and future delivery of the cattle was not within the scope of such bond. Therefore, the Court finds that Defendant HARTFORD is not liable for any damages suffered by Plaintiff. It is further found that Plaintiff's cause of action is not one based on a sworn account and, therefore, no attorney's fees are recoverable under Article 2226, Texas Revised Civil Statutes.

IT IS, THEREFORE, ADJUDGED:

(1) That Plaintiff, JOHN MILES, JR., take nothing from Defendant, HARTFORD ACCIDENT AND INDEMNITY COMPANY;

(2) That Plaintiff, JOHN MILES, JR., recover from Defendant, ROBERT K. STARKS d/b/a WESTERN CATTLE COMPANY and d/b/a SAGINAW CATTLE COMPANY, the sum of $25,580.23 plus interest to date of judgment at the rate of nine percent per annum from October 6, 1976, and costs of Court, for which let execution issue. This judgment shall bear interest from date at the rate of nine percent per annum.

SIGNED on this 3rd day of October, 1978.

ENTERED on this 3rd day of October, 1978.

/s/ Herman Fitts
HERMAN FITTS, JUDGE
29th Judicial District
Hood County, Texas

APPENDIX B

CONSTITUTION OF THE UNITED STATES
Art. 1, §8, Cl. 3

"The Congress shall have Power . . .

• • •

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

THE "PACKERS and STOCKYARDS ACT, 1921" 7 USC:

"§ 183. When transaction deemed in commerce; "State" defined

For the purpose of this chapter (but not in anywise limiting the definition in section 182 of this title) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the livestock and meat-packing industries, whereby livestock, meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in

respect thereto from the provisions of this chapter. For the purpose of this section the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation. Aug. 15, 1921, c. 64, § 2(b), 42 Stat. 159."

"§ 201. 'Stockyard owner'; 'stockyard services'; 'market agency'; 'dealer'; defined

When used in this chapter—

* * *

(d) The term 'dealer' means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser. Aug. 15, 1921, c. 64, § 301, 42 Stat. 163; Sept. 2, 1958, Pub. L. 85-909, § 2(1), 72 Stat. 1750."

"§ 203. Registration of stockyard dealer or market agency; penalty for failure to register

After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 202 of this title by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Every other person operating as a market agency or dealer as defined in section 201 of

this title may be required to register in such manner as the Secretary may prescribe. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Aug. 15, 1921, c. 64, § 303, 42 Stat. 163; Sept. 2, 1958, Pub.L. 85-909, § 2(3), 72 Stat. 1750."

"§ 204. Bond and suspension of registrants

On and after July 12, 1943 the Secretary may require reasonable bonds from every market agency and dealer, under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction. July 12, 1943, c. 215, § 1, 57 Stat. 422."

"§ 228b. Prompt payment for purchase of livestock—Full amount of purchase price required; methods of payment

(a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and

transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment."

APPENDIX C

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

Chapter II—Packers and Stockyards Administration, Department of Agriculture

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

* * *

"§ 201.43 Payment and accounting for livestock and live poultry.

(b) *Purchasers to pay promptly for livestock.* Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction. The provisions of this section shall not be construed to permit any transaction prohibited by § 201.61(a) relating to financing by market agencies selling on a commission basis.

(c) *Purchasers to promptly reimburse agents.* Each packer, market agency, or dealer who utilizes or employs an agent to purchase livestock for him, shall, in transactions where such agent uses his own funds to

pay for livestock purchased on order, transmit, or deliver to such agent the full amount of the purchase price before the close of the next business day following receipt of notification of the payment of such purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of the principal and in the records of any market agency or dealer acting as such agent."

PROOF OF CLAIM UNDER SURETY BOND ISSUED UNDER PROVISIONS OF THE PACKERS AND STOCKYARDS ACT, 1921, AS AMENDED

(Clause Two or Three Bond)

STATE OF **TEXAS**

COUNTY **PARKER**

The undersigned, **John Miles, Jr.** *(full name of claimant)*

of **Cresson** *(city)*, **Texas** *(state)*,

being duly sworn, deposes and says:

1. That he makes this claim to **Director—Dept. of Agri.—State of Ill.** *(name of trustee)*, under the bond issued by the **Hartford Accident & Indemnity Co.** *(name of surety company)* on behalf of **Western Cattle Co.** *(full name and address of principal named in bond)*, in the amount of **$25,580.23** *(amount of claim)*, due and owing as the purchase price of livestock purchased by **Robert K. Starks** *(full name and address of buyer registrant)* for his account or for the accounts of others, from the undersigned claimant.

2. That as the basis of such claim, states that the following described livestock was purchased and received by **Robert K. Starks** *(name of buyer registrant)*:

DATE OF SALE	NUMBER OF HEAD	DESCRIPTION OF LIVESTOCK	PURCHASE PRICE
			$

(On Separate Sheet)

— P&SA USDA —

29 OCT 76 12:07

(over)

3. That attached hereto and made a part of this claim are copies of the invoices and/or other documents covering the livestock transaction, copies of checks issued and unpaid for the livestock purchased by **Robert K. Starks**, and other instruments indicating the delivery of the livestock in question to such purchaser for which payment has not been made. *(If full and complete documents of the transaction are not available or if these papers have become lost or destroyed, the claimant should insert a statement below of the facts in such respect:)*

(name of buyer registrant)

(On Separate Sheet)

4. That no part of said amount has been paid, and there are no setoffs or counterclaims to the same.

5. I hereby authorize the Packers and Stockyards Administration to release this proof of claim form and all supporting documents attached thereto to the trustee, surety company, or to other interested parties to facilitate the processing of my claim.

.....**John Miles, Jr. (Rancher)**.....
(signature and title of claimant)

Subscribed and sworn to before me this.....**21st**.....day of.....**September**....., 19...**76**....

.....**Billie J. Meyers**.....
Notary Public for the
State of.....**Texas**.....
residing at.....**Granbury, Hood Co.,**
.....**Texas**.....

RECEIVED

SEPT 27 1976

PKRS. & STKYDS, ADM.
SPRINGFIELD, ILLINOIS

My Commission expires
.....**June 1, 1977**.....(seal)

Supreme Court, U.S.
FILED
AUG 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-150

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HARTFORD ACCIDENT & INDEMNITY COMPANY
Petitioner

vs.

JOHN MILES, JR.
Respondent

Respondent's Brief Opposing Certiorari

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JURISDICTION

The Court of Civil Appeals decided this case under Texas Law (Texas Business and Commerce Code, §§1.201(32); 2.106; 2.401[b]; 2.501 -- the U.C.C.). This holding under state law (that there was a "purchase") being adequate to support the judgment, this Court has no jurisdiction to review. *Herb v. Pitcairn*, (1954) 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789.

Further, the point raised has been decided by *Smeed v. National Surety Corp.*, (C.C.A., 9th, 1960) 274 F.2d 414, and no important question of federal law is involved, under 28 USC §1257(3).

STATEMENT OF THE CASE

The facts are as stated in the opinion of the Court of Civil Appeals. See Petition for Certiorari, Appendix A, pp. 12-20. It should, however, be emphasized that Starks (dealer) paid $14,300.00 part payment when the sale contract was executed. Delivery was FOB the ranch. The parties worked together to sell the cattle to third parties, carefully crediting the dealer's debt with the proceeds of resale. The seller thus avoided the pitfall presented by *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. 1976) cert. den. 429 U.S. 834, 97 S.Ct. 98, 50 L.Ed.2d 99, with full knowledge and assistence of the defaulting seller. The Court below held that a sale and purchase was effected under Texas law.

Petitioner took the position in the Court of Civil Appeals that the state law controlled, and, that the Packers and Stockyards Act didn't apply. *Brief of Appellee, Court of Civil Appeals, Counterpoint One:*

> "Since the executory contract in question called for Miles to deliver his cattle to Starks when Starks paid for them, neither of which occurred,

> *the Packers and Stockyards Act is inapplicable,* and Hartford is not liable on Starks' bond which it executed as surety."

Also, at p. 14:

> "Although the Federal Courts have jurisdiction to hear cases arising under the Packers and Stockyards Act, 28 U.S.C.A. §1352, we are not involved with a question of statutory interpretation requiring resort to Federal Law; rather our question is whether a purchase took place. This must be determined according to the law of the state of the transaction. Thus, Texas law applies in the instant case. See, *Sneed* [sic] *v. Carpenter,* 274 F.2d 414, 417 (9th Cir. 1960)"

Petitioner's position on certiorari before this Court is diametrically opposite its position below. Further, at no point below did Petitioner challenge the constitutionality of the Packers and Stockyards Act.

ARGUMENT

The question was correctly decided in *Smeed v. National Surety Corp.*, (9th Cir., 1960) 274 F.2d 414.

The *Smeed* case involved two distinct cattle sales. In the first, cattle were sold to defendant at a stockyard. Before delivery, he told plaintiff he was unable to pay for the cattle. As in the instant case, the parties agreed to the resale of the cattle to third parties. They sold for less than plaintiff had contracted to buy them for. The court held the surety liable on the defaulting dealer's bond for the difference. The court said:

> "If the surety is not liable under the circumstances here recited, the giving of the required

> bond would be an idle gesture, because no liability could be incurred unless appellant's practice of paying consignors prior to receipt of payment from purchasers was changed, and such a change is neither required by law nor desirable."

By the same token, to hold in this case that the surety is not liable on the bond would be to destroy all cattle contracts for future delivery, thus disrupting the stream of commerce and subverting the express purpose of the Act.

The second set of cattle in the *Smeed* case were purchased by defendant's agent at the seller's ranch. The cattle were to be later delivered at a feed yard, weighed, and payment made. The court held that the purchase was complete prior to delivery of the cattle, "under Idaho law which controls here since the transaction took place in that state." (274 F.2d 417).

The court went on to hold that the bond did not apply in that case, as the Packers and Stockyards Act at that time covered purchases at public stockyards only. The Act was amended (probably as a result of this case), so as to include sales made in the country. (7 USCS §201(c and d), Amended, Act Sept. 2, 1958). Accordingly, the Act expressly covered the sale in this case.

Smeed properly held that delivery by transfer of physical possession was not necessary to a completed sale transaction. There is no language in the Act, regulations or bond which requires physical delivery as a condition to liability either of the dealer or of the bonding company. Such a requirement would disrupt the channels of commerce, wherein millions of sales are made daily without the archaic requirement

of actual physical delivery of the goods being a prerequisite to a completed sale transaction.

The Act was intended to protect farmers and ranchers from loss resulting from selling cattle to defaulting or insolvent buyers. *Travelers Indemnity Co. v. Manly Cattle Co.*, 553 F.2d 943, 945 (5th Cir. 1977). The purpose of the Act has also been held to be:

> ". . . to assure fair trade practices in the livestock marketing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock." *Vanwyk v. Bergland*, 570 F.2d 701 (8th Cir., 1978).

The Court below properly applied the Act. It is incredible that Petitioner would, as it has here, argue that failure to require a transfer of possession would invite farmers and ranchers to be guilty of fraud and collusion.

To the contrary, for the dealer to contract the rancher's cattle, and attempt to place the risk of a declining cattle market on the rancher bound to deliver the cattle to him in the future, and then have the bonding company attempt to renege on its bond on the technicalities here urged, delaying payment to the rancher by four years, is patently unfair. It is, as stated by §228b(c)[1] an "unfair practice."

---

[1] **(c) Delay in payment or attempt to delay deemed unfair practice.** Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this Act [7 USCS §§ 181 et seq.]. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this Act [7 USCS §§ 181 et seq.].

(Aug. 15, 1921, c. 64, Title IV, § 409, as added Sept. 13, 1976, P. L. 94-410, § 7, 90 Stat. 1250.)

PRAYER

Respondent John Miles, Jr. prays that certiorari be in all things denied.

Respectfully submitted,

WINFRED HOOPER, JR.
Attorney for Respondent
HOOPER & CHAPPELL, P.C.
810 West Tenth Street
Fort Worth, TX 76102
(817) 335-9377

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing response to Petition for Writ of Certiorari has been made by depositing the same at the United States Post Office with postage prepaid first class on Petitioner, Hartford Accident and Indemnity Company, by mailing three (3) copies to its attorney of record, Rufus S. Garrett, Jr., 2900 Fort Worth National Bank Building, Fort Worth TX 76102.

It is further certified that all parties required to be served have been served as aforesaid this 5th day of August, 1980.

WINFRED HOOPER, JR.